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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FIVE

THE PEOPLE, **Plaintiff and Respondent,** **v.** **TRAVIS CASEBOLT,** **Defendant and Appellant.**	**A136119** **(Solano County Super. Ct. No. FC29419)**

Travis Casebolt (appellant) appeals from an order committing him to the State Department of Mental Health (DMH), now the State Department of State Hospitals, for an indeterminate period as a sexually violent predator (SVP) under the Sexually Violent Predators Act (SVPA). (Welf. & Inst. Code, § 6600 et seq.) He contends the judgment must be reversed because (1) the evidence was insufficient to support a current diagnosis of sexual sadism; (2) the court should have given a sua sponte instruction quantifying the risk of reoffense necessary to support a commitment; (3) the trial court erred by failing to instruct the jury sua sponte that an SVP commitment is for an indefinite time period; (4) the protocol governing SVP evaluations is invalid; (5) commitment without the prospect of effective treatment violates his right to due process; (6) the court should have instructed the jury sua sponte that it must unanimously agree on the disorder that provides a basis for commitment; and (7) the SVPA is an unconstitutional ex post facto law, improperly shifts the burden of proof, and violates appellant's right to equal protection. We reject appellant's contentions and affirm.

BACKGROUND

In November 1990, appellant approached the six-year-old foster sister of his girlfriend in the family's barn. Using duct tape, he taped her ankles, wrists, and mouth. He spanked her on her legs and bottom, put her in his truck, and drove her to a remote location. He placed her on a mattress, partially removed her clothing, and digitally penetrated her. Appellant then raped the victim and forced her to orally copulate him. Afterward, he abandoned her.

In June 1991, appellant was convicted of kidnapping for the purpose of committing a lewd act (Pen. Code, § 207, subd. (b)) and three counts of lewd acts (*id*., § 288, subd. (b)) and was sentenced to prison for 33 years. In November 2009, after appellant served 18 years in prison, the Solano County District Attorney filed a petition to commit appellant as an SVP pursuant Welfare and Institutions Code, section 6600 et seq.[1]

At trial, Drs. Deidre D'Orazio and Douglas Korpi testified as experts for the prosecution. They both diagnosed appellant with sexual sadism. Dr. D'Orazio also diagnosed appellant with anti-social personality disorder (ASPD) and polysubstance dependence. Although there is disagreement among experts as to how to diagnose sexual sadism, Dr. Korpi was confident in his diagnosis due to five factors: (1) bondage pornography was found in appellant's bedroom when he was arrested for the 1990 crime; (2) the crime evidenced elaborate planning; (3) his actions demonstrated an ability to put aside all empathy for the victim; (4) the crime involved excessive sexual activity; (5) the crime involved unnecessary violence. In addition to the circumstances of the crime, Dr. D'Orazio relied on the fact that appellant had engaged in forced sadistic sex with his girlfriend over a period of two years, and the fact that many sadomasochistic pornographic magazines were found in appellant's possession during the investigation of the crime. She also faulted appellant for failing to enroll in an available treatment program during his pretrial commitment.

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1 All undesignated section references are to the Welfare and Institutions Code.

Both doctors testified that appellant was likely to engage in sexually violent predatory criminal acts as a result of his diagnosed mental disorders. Although appellant scored in the average risk range on an actuarial assessment instrument, Dr. D'Orazio expressed concerns about the reliability of the instrument as applied to sexual sadists. Dr. D'Orazio opined that sexual sadists are particularly dangerous because their mental disorders are well-entrenched; Dr. Korpi pointed out that the types of crimes appellant would commit if he were to reoffend would be particularly harmful. Dr. D'Orazio also found many dynamic risk factors that increased appellant's risk of reoffense, and no protective factors that decreased the risk.

Defense expert Dr. John Podboy opined that appellant did not suffer from a current mental disorder. He did not find enough evidence in appellant's history to make a sexual sadism diagnosis.

In July 2012, a jury found the petition to be true, and the court committed appellant to the DMH for an indeterminate term. This appeal followed.

DISCUSSION

I. *Substantial Evidence Supports a Current Diagnosis of Sexual Sadism*

A person may be committed as an SVP only if the People prove beyond a reasonable doubt that "(1) the offender has been convicted of a qualifying sexually violent offense . . . ; (2) the offender has a diagnosable mental disorder; (3) the disorder makes it likely he or she will engage in sexually violent criminal conduct if released; and (4) this sexually violent criminal conduct will be predatory in nature." (*Cooley v. Superior Court* (2002) 29 Cal.4th 228, 236, 243 (*Cooley*); see also *id.* at p. 243; § 6600, subds. (a), (c).)[2] Appellant contends the trial court's commitment order must be set aside because the evidence did not support a finding he currently suffers from a sexual sadism disorder.

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[2] At the time *Cooley* was decided, the SVPA required proof that the offender had been convicted of qualifying offenses against at least two victims. (*Cooley*, *supra*, 29 Cal.4th at p. 236.) Effective November 8, 2006, the People are required to prove only that the offender has been convicted of a qualifying offense "against one or more victims." (§ 6600, subd. (a)(1).)

As with any challenge to the sufficiency of the evidence, we review the entire record in the light most favorable to the verdict to determine whether substantial evidence supports the SVP finding. (*People v. Mercer* (1999) 70 Cal.App.4th 463, 466.) "[T]his court may not redetermine the credibility of witnesses, nor reweigh any of the evidence, and must draw all reasonable inferences, and resolve all conflicts, in favor of the judgment. [Citation.]" (*People v. Poe* (1999) 74 Cal.App.4th 826, 830.) In particular, we do not reassess the credibility of experts or reweigh the relative strength of their conclusions. (*Ibid.*) "The testimony of one witness, if believed, may be sufficient to prove any fact. (Evid. Code, § 411)." (*People v. Rasmuson* (2006) 145 Cal.App.4th 1487, 1508 (*Rasmuson*).)

In the present case, the prosecution experts opined that appellant currently suffered from sexual sadism and that the disorder made appellant likely to reoffend in a sexually violent predatory manner. They explained the bases for their opinions and were cross-examined by appellant's counsel. Appellant criticizes the prosecution experts' testimony and points out that Dr. Podboy disagreed with their diagnoses. However, a conflict between expert witnesses does not, by itself, undermine the sufficiency of the evidence supporting the verdict.

Appellant also contends there is insufficient evidence he *currently* suffers from sexual sadism because the prosecution experts primarily relied on the facts of the 1990 offenses to support their diagnoses. However, experts may properly consider a defendant's past crimes in assessing whether he currently suffers from a mental disorder. (See *Hubbart v. Superior Court* (1999) 19 Cal.4th 1138, 1163-1164 (*Hubbart*) [noting the United States Supreme Court "has consistently upheld commitment schemes authorizing the use of prior dangerous behavior to establish both present mental impairment and the likelihood of future harm"].) Moreover, in forming their diagnoses, Drs. D'Orazio and Korpi not only reviewed records describing the circumstances surrounding appellant's 1990 offenses, but they also interviewed appellant in person. Thus, their diagnoses were based in part on their recent interviews with appellant, and not

just the circumstances of the offenses. Appellant cites no authority that a different type of evidence is necessary to support an expert's diagnosis.

Appellant relies on *Rasmuson*, in which the court found the evidence was insufficient to support the trial court's denial of an SVP's petition for conditional release. The court there stated, "A person's history should not be determinative of whether he or she is a danger to reoffend. . . . That history is static and will never change. As substantial time has passed, its reliability as a predictor of a defendant's future behavior becomes more equivocal. If such static factors predominated in the assessment of whether an SVP should be given conditional release, a serious offender would never be released regardless of what events subsequent to his offenses revealed, which is contrary to the intent of [the] SVPA, which allows conditional release even with some risk of reoffending." (*Rasmuson, supra,* 145 Cal.App.4th at p. 1509.) *Rasmuson* is distinguishable because in that case, the evidence showed the defendant had participated in extensive sex offender treatment and was found by eight mental health experts to be unlikely to reoffend. (*Id.* at p. 1508.) In the absence of even a "scintilla" of evidence to the contrary (*ibid.*), the denial of the petition was "tantamount to concluding that no SVP who has ever committed a prior serious sexual offense, regardless of how long ago it occurred, can be conditionally released" (*id.* at p. 1509). Here, the evidence showed not only that appellant had committed heinous sexual offenses, but two experts opined he was an SVP and appellant had refused treatment. (See *People v. Sumahit* (2005) 128 Cal.App.4th 347, 354 (*Sumahit*) ["[the] defendant's refusal to undergo treatment constitutes potent evidence that he is not prepared to control his untreated dangerousness by voluntary means"].)

As the court explained in *Sumahit, supra*, 128 Cal.App.4th at page 353, "[the] defendant errs in supposing that he must presently engage in overt manifestations of a sexually violent predator in order to support an opinion that he still suffers from a mental disorder affecting his ability to control his impulses. The fact that [the] defendant has not misbehaved in a strictly controlled hospital environment does not prove he no longer suffers from a mental disorder that poses a danger to others. . . . [The] lack of outward

signs of sexual deviance is not dispositive of whether he is likely to reoffend if released into society at large. Such an assessment must include consideration of his past behavior, his attitude toward treatment and other risk factors applicable to the facts of his case." We conclude substantial evidence supports the sexual sadism diagnosis.

In any event, Dr. D'Orazio also stated that appellant was an SVP based on her ASPD diagnosis. Appellant does not contend the ASPD diagnosis is not supported by substantial evidence, and, contrary to appellant's assertion on appeal, the ASPD diagnosis was sufficient to support the DMH commitment. (*Hubbart, supra,* 19 Cal.4th at p. 1158.) Accordingly, even if there were insufficient evidence in the record to support a current sexual sadism diagnosis, the jury's ultimate finding that appellant is an SVP is supported by substantial evidence.

II. *The Court Was Not Required to Give a Sua Sponte Instruction Quantifying the Risk of Reoffense*

Appellant argues reversal is required because the court did not adequately instruct the jury on the risk of reoffense that is necessary to commit a person as an SVP. He claims the court should have given a sua sponte instruction that more precisely defined the degree of risk.

By statute, an SVP must have a "diagnosed mental disorder that makes the person a danger to the health and safety of others in that it is likely that he or she will engage in sexually violent criminal behavior." (§ 6600, subd. (a)(1).) "Likely" has been judicially construed to mean " 'the person presents a substantial danger, that is, a serious and well-founded risk, that he or she will commit such crimes if free in the community.' [Citation.]" (*People v. Roberge* (2003) 29 Cal.4th 979, 982, 989, italics omitted.) The risk of reoffense must be greater than a "mere possibility," but need not be "better than even," i.e., greater than 50 percent. (*People v. Superior Court (Ghilotti)* (2002) 27 Cal.4th 888, 922.) The jury was so instructed.

Appellant argues the instructions did not go far enough because they failed to "explain the requisite minimum level of risk that the jury must agree upon." However, he cites to no portion of the record where he requested an additional instruction on this point

and he has not, in his appellate briefs, suggested clarifying language. "Once the trial court adequately instructs the jury on the law, it has no duty to give clarifying or amplifying instructions absent a request." (*People v. Butler* (2010) 187 Cal.App.4th 998, 1013 (*Butler*).) Appellant's claim is without merit.

III. *The Court Was Not Required to Give a Sua Sponte Instruction Informing the Jury That an SVP Commitment Is for an Indefinite Time Period*

Appellant contends the trial court should have instructed the jury sua sponte that a true finding appellant is an SVP would result in his indefinite commitment. Defendant argues that failing to instruct the jury on the consequences of its true finding "may give them the mistaken impression that a civil commitment is short term and allows for real review in the future." The contention fails.

"The trial court has a sua sponte duty to instruct the jury on the general principles of law that are necessary for the jury's understanding of the case. [Citation.]" (*Butler, supra,* 187 Cal.App.4th at p. 1013.) At appellant's SVP trial, the jury was asked to determine, based on the evidence presented by the parties, whether appellant is an SVP. (§ 6604.) The trial court properly instructed the jury on the principles of law governing its resolution of that issue. The duration of any commitment to be imposed based on the jury's findings was irrelevant. Accordingly, the trial court was not required to instruct the jury sua sponte regarding the consequences of an SVP finding. (See *People v. Allen* (1973) 29 Cal.App.3d 932, 935-938 [trial court erred in a mentally disordered sex offender proceeding by allowing evidence regarding the type and length of treatment the defendant would receive].)

IV. *Appellant Has Not Shown He Was Prejudiced by any Legal Flaw in the Protocol Governing SVP Evaluations*

Section 6601 governs referral of prisoners for SVP evaluation prior to release from incarceration. It provides in pertinent part: "The [DMH] shall evaluate the person in accordance with a standardized assessment protocol, developed and updated by the [DMH], to determine whether the person is a sexually violent predator as defined in this article. The standardized assessment protocol shall require assessment of diagnosable mental disorders, as well as various factors known to be associated with the risk of

reoffense among sex offenders. Risk factors to be considered shall include criminal and psychosexual history, type, degree, and duration of sexual deviance, and severity of mental disorder." (§ 6601, subd. (c).) Appellant contends the guidelines devised by the DMH in 2009 are insufficiently detailed to qualify as the "standardized assessment protocol" required by section 6601.

Appellant has failed to show any prejudice resulting from the use of an invalid assessment protocol. In *People v. Pompa-Ortiz* (1980) 27 Cal.3d 519 (*Pompa-Ortiz*), the Supreme Court held illegalities in criminal preliminary hearings that are not "jurisdictional in the fundamental sense" are not reversible per se on an appeal following trial. (*Id.* at p. 529.) Rather, such illegalities must be reviewed "under the appropriate standard of prejudicial error and shall require reversal only if [the] defendant can show that he was deprived of a fair trial or otherwise suffered prejudice as a result of the error at the preliminary examination." (*Ibid.*) The court continued, "The right to relief without any showing of prejudice will be limited to pretrial challenges of irregularities. At that time, by application for extraordinary writ, the matter can be expeditiously returned to the magistrate for proceedings free of the charged defects." (*Ibid.*) "In other words, a defendant who feels he has suffered error at his preliminary hearing can seek to correct that error by filing a pretrial writ petition. If he does not, and elects to go to trial, the error at the preliminary hearing can only lead to reversal of the conviction if the error created actual prejudice." (*People v. Hayes* (2006) 137 Cal.App.4th 34, 50 (*Hayes*).) "The *Pompa-Ortiz* rule apples to denial of substantive rights and technical irregularities in proceedings, and to SVPA proceedings. [Citations.]" (*In re Ronje* (2009) 179 Cal.App.4th 509, 517 (*Ronje*).)

In this case, assuming arguendo the 2009 protocol is invalid, the use of evaluations based on the protocol did not deprive the trial court of fundamental jurisdiction over the SVPA commitment petition. (*Ronje*, *supra*, 179 Cal.App.4th at p. 518; *People v. Medina* (2009) 171 Cal.App.4th 805, 816.) Accordingly, the judgment may be reversed only upon a showing of prejudice. (*Pompa–Ortiz*, *supra*, 27 Cal.3d at p. 529; *Hayes*, *supra*, 137 Cal.App.4th at pp. 50-51.)

Appellant has not demonstrated prejudice. He was provided a full-blown jury trial and, at that trial, two experts testified that based on their training and experience, appellant was an SVP as that term is statutorily defined. After hearing the evidence presented, the jurors concluded, beyond a reasonable doubt, that appellant was an SVP within the meaning of section 6600, subdivision (a)(1). Because appellant received a full and fair trial on the ultimate issue in the case, we conclude appellant was not prejudiced by the error he has alleged. (See *Hayes*, *supra*, 137 Cal.App.4th at p. 51 [defendant failed to demonstrate he was prejudiced by trial court's failure to hold a probable cause hearing at the outset of the case]; *People v. Butler* (1998) 68 Cal.App.4th 421, 435 [reversal not warranted where defendant failed to seek pretrial review of the trial court's failure to provide a proper probable cause hearing where "[h]e was found to be an SVP after a trial at which he was able to cross-examine the prosecution's witnesses and call his own witnesses"].)[3]

V. *The Commitment Did Not Violate Due Process for Lack of Effective Treatment*

Appellant contends his commitment under the SVPA violates due process because the evidence failed to establish he would receive appropriate and effective treatment during his commitment.

Our Supreme Court rejected a similar due process challenge in *Hubbart*, *supra*, 19 Cal.4th 1138. There, the defendant asserted that involuntary confinement as an SVP violates due process "unless it is coupled with a statutory guarantee of treatment providing 'a realistic opportunity to be cured.' " (*Hubbart*, *supra*, 19 Cal.4th at p. 1164.) "At the outset, [the court rejected the] suggestion that the Legislature cannot constitutionally provide for the civil commitment of dangerous mentally impaired sexual predators unless the statutory scheme guarantees and provides 'effective' treatment."

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[3] Because we need not and do not decide whether the 2009 protocol is valid, we deny respondent's December 20, 2012 request we take judicial notice of the protocol.

(*Ibid.*) The court also pointed out that the SVPA provides for treatment under section 6606, subdivision (c).[4] (*Hubbart*, at p. 1167.)

Appellant contends the treatment provided by the DMH is ineffective, but he fails to cite any authority for the proposition that the constitutionality of his commitment as an SVP requires proof of the effectiveness of the treatment he will be provided. He primarily relies upon *People v. Feagley* (1975) 14 Cal.3d 338, but that case was distinguished in *Hubbart*, which explained, "We invalidated the MDSO procedure under which [Mr.] Feagley was committed because it resulted in a complete denial of treatment under conditions of confinement so penal as to constitute 'cruel and unusual punishment.' [Citation.]" (*Hubbart, supra*, 19 Cal.4th at p. 1168, fn. 29.)

We conclude appellant's claim is foreclosed by *Hubbart, supra,* 19 Cal.4th 1138.

VI. *The Court Was Not Required to Give a Sua Sponte Unanimity Instruction*

The trial court instructed the jury that the People were required to prove beyond a reasonable doubt that appellant suffered from a diagnosed mental disorder and provided, "The term diagnosed mental disorder includes conditions either existing at birth or acquired after birth that affect a person's ability to control emotions and behavior and predispose that person to commit criminal sexual acts to an extent that makes him or her a menace to the health and safety of others." (See § 6600, subd. (c).) The People's experts testified that appellant suffered from sexual sadism, ASPD, and polysubstance dependence. Appellant contends the trial court should have given, sua sponte, an instruction requiring the jurors to unanimously agree appellant suffered from sexual sadism before finding him to be an SVP.

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4 Effective June 27, 2012, section 6606, subdivision (c) provides, "The programming provided by the State Department of State Hospitals in facilities shall be consistent with current institutional standards for the treatment of sex offenders, and shall be based on a structured treatment protocol developed by the State Department of State Hospitals. The protocol shall describe the number and types of treatment components that are provided in the program, and shall specify how assessment data will be used to determine the course of treatment for each individual offender. The protocol shall also specify measures that will be used to assess treatment progress and changes with respect to the individual's risk of reoffense."

Appellant was not entitled to a unanimous jury determination regarding his particular diagnosis. The SVPA requires that a jury's *verdict* be unanimous, but it does not require unanimity as to each element necessary to support an SVP finding. (*People v. Carlin* (2007) 150 Cal.App.4th 322, 347 (*Carlin*); *People v. Fulcher* (2006) 136 Cal.App.4th 41, 59 (*Fulcher*).) Moreover, because an SVP proceeding is civil in nature, case law concerning unanimity instructions in criminal cases does not apply. (*Carlin*, at p. 347; *Fulcher*, at p. 59.) Even in the context of a criminal case, no unanimity instruction is required where the evidence shows only a single discrete crime but leaves room for disagreement as to exactly how that crime was committed. (*Carlin*, at p. 347.) By analogy, in an SVP case the jury must agree unanimously that the defendant suffers from a diagnosed mental disorder, but evidence that he suffers from more than one such disorder simply provides alternative theories as to how this requirement is met.

Appellant complains an ASPD does not meet the "mental disorder" element of the SVPA; and, under the facts of this case, he could only be committed if the jury agreed he suffered from sexual sadism. We disagree. In *Hubbart*, *supra*, 19 Cal.4th at page 1158, the Supreme Court rejected an argument that the SVPA was unconstitutional because it did not exclude from its purview "[ASPD] or other conditions characterized by an inability to control violent antisocial behavior." Nothing in the SVPA or the federal Constitution prohibits a jury from relying on a personality disorder as a basis for an SVP determination. (*Hubbart*, at pp. 1158-1161.)[5]

VII. *The SVPA Is Not an Unconstitutional Ex Post Facto Law and Does Not Improperly Shift the Burden of Proof or Violate Appellant's Right to Equal Protection*

As originally enacted, the SVPA provided for a two-year commitment, established procedures for release of an SVP before the expiration of the two-year period, and allowed recommitment upon expiration of the two-year period only if it was proved

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5 Although we are not aware of any case authority regarding whether a diagnosis of polysubstance dependence can provide the sole basis for an SVP determination, we need not decide that issue because appellant does not argue there is a possibility that any jurors relied solely on that diagnosis in finding he is an SVP. Dr. D'Orazio, who made that diagnosis, opined it was a "secondary" disorder for appellant.

beyond a reasonable doubt that the person currently met the statutory criteria. (*People v. McKee* (2010) 47 Cal.4th 1172, 1185-1186 (*McKee I*).)

In November 2006, the SVPA was amended to make it more difficult for an SVP to obtain release. "[U]nder Proposition 83, an individual SVP's commitment term is indeterminate, rather than for a two-year term as in the previous version of the [SVPA]. An SVP can only be released conditionally or unconditionally if the DMH authorizes a petition for release and the state does not oppose it or fails to prove beyond a reasonable doubt that the individual still meets the definition of an SVP, or if the individual, petitioning the court on his [or her] own, is able to bear the burden of proving by a preponderance of the evidence that he [or she] is no longer an SVP. In other words, the method of petitioning the court for release and proving fitness to be released, which under the former [SVPA] had been the way an SVP could cut short his [or her] two-year commitment, now becomes the only means of being released from an indefinite commitment when the DMH does not support release." (*McKee I*, *supra*, 47 Cal.4th 1187-1188, fn omitted.)

Appellant contends the post-Proposition 83 SVPA violates his constitutional right to due process because it imposes on him "the burden to prove by a preponderance of the evidence that he . . . is entitled to release" after being committed as an SVP. He also contends the SVPA violates the federal constitutional prohibition against ex post facto laws, because it is punitive and was applied to his conduct prior to its enactment. These contentions were considered and rejected by *McKee I*, *supra*, 47 Cal.4th at pages 1191, 1195. We are bound by the decisions of our Supreme Court. (*Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455.) Therefore, we reject appellant's due process and ex-post facto claims.

Appellant also contends his involuntary SVP commitment violates his federal constitutional right to equal protection because the SVPA treats him less favorably than similarly situated individuals committed under other statutes, such as mentally disordered offenders (MDO's) and criminal defendants sentenced to life in prison. In *McKee I*, *supra*, 47 Cal.4th at page 1203, the Supreme Court found SVP's and MDO's are

similarly situated because, inter alia, both " 'have been found, beyond a reasonable doubt, to suffer from mental disorders that render them dangerous to others. . . . At the end of their prison terms, both have been civilly committed to the [DMH] for treatment of their disorders. . . . The purpose of the MDO Act and the SVPA is the same: to protect the public from dangerous felony offenders with mental disorders and to provide mental health treatment for their disorders.' [Citations.]" The court concluded the disparate treatment afforded SVP's and MDO's under the law, whereby SVP's suffer indefinite commitment and carry the burden of proving they should no longer be committed and MDO's are subjected to a short-term commitment renewable only if the People prove periodically that continuing commitment is justified beyond a reasonable doubt, "raises a substantial equal protection question that calls for some justification by the People." (*Ibid.*) Accordingly, the Supreme Court remanded the case to the trial court "to determine whether the People . . . can demonstrate the constitutional justification for imposing on SVP's a greater burden than is imposed on MDO's . . . in order to obtain a release from commitment." (*Id.* at pp. 1208-1209, fn. omitted.)

The remand in *McKee I* resulted in a 21-day evidentiary hearing and a subsequent finding by the trial court that the People met their burden to justify the disparate treatment of SVP's. (See *People v. McKee* (2012) 207 Cal.App.4th 1325, 1330 (*McKee II*).) Mr. McKee again appealed and the finding was upheld by the Fourth District, which concluded the disparate treatment of SVP's is necessary to further compelling state interests. (*McKee II*, at pp. 1330-1331, 1347-1348; see also *People v. McKnight* (2012) 212 Cal.App.4th 860, 862 (*McKnight*).) In *McKnight*, Division Three of this court concluded *McKee II* was dispositive of the equal protection claim in that case, rejecting Mr. McKnight's contention that the Supreme Court's remand resolved the equal protection claim only as applied to Mr. McKee. (*McKnight*, at pp. 863-864 ["It is plain that *McKee II* is not to be restricted to Mr. McKee alone or only to those SVP's convicted of crimes against children, . . . but rather its holding applies to the class of SVP's as a whole."].) We agree, and conclude in this case that appellant's recommitment under the

SVPA does not violate his right to equal protection despite the disparate treatment of SVP's as compared to MDO's.

Appellant also contends SVP's are treated unfavorably as compared to criminals sentenced to life in prison with the possibility of parole. Appellant's claim fails because he has not shown SVP's are similarly situated to that class of criminals. (See *McKee I, supra*, 47 Cal.4th at pp. 1202-1203.)

DISPOSITION

The judgment is affirmed.

SIMONS, J.

We concur.

JONES, P.J.

BRUINIERS, J.